Commission, after the railroads on application to the Commission under the long and short haul clause had reduced their rates to a competitive port, and after the water competition subsequently ceased because the water routes were blocked, the Commission favored an application of intermediate cities to have the terminal rates raised. The best explanation of this case, it is submitted, lies not in the fact that the Commission supervised the original reduction of the rate, nor in the fact that a shipper and not the railroad sought the advance of rates, but in the fact that the destruction of the water competition was not due to the reduced railroad rates.[13]

THE BRITISH BLACK LIST. — On December 23, 1915, Great Britain passed "an Act to provide for the Extension of the Restrictions relating to Trading with the Enemy," to the following effect: "His Majesty may by Proclamation prohibit all persons . . . resident, carrying on business, or being in the United Kingdom from trading with any persons . . . whenever by reason of the enemy nationality or enemy association of such persons . . . it appears to His Majesty expedient so to do. . . ."[1] A Black List of neutral firms with which English firms and steamship lines have been forbidden to deal is the result of the proclamations issued as provided by the act, and reënforced by applications of the Order in Council for November 10, 1915, requiring licenses for British steamers over five hundred tons to trade from one foreign port to another. The consequences have been financially serious for many of such blacklisted neutral firms, because most of the international trade is now being carried on British bottoms. Protest has been made by the United States, and a diplomatic correspondence has followed.[2] Complaints in this country have been specially bitter owing to suspicions that the use of the Black List has not been confined to belligerent purposes, but that it has been used to keep American firms out of that part of the South American trade which Germany shared with Great Britain before the war.[3]

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[13] The decision, however, was put principally on the grounds (1) that the rates in the absence of competition were unduly preferential, and (2) that raising of the rates would tend to encourage competition again and thus accomplish the purpose of the provision. The first reason is not a sound one, for, as we have shown, the provision is an exception to the policy of the Act in preventing undue preferences. Nor is the second reason more valid; for the same reason might be urged in any case where the provision was to be applied, and, if sound, it would render the provision nugatory.

[1] Trading with the Enemy (Extension of Powers) Act 1915, 5 & 6 GEORGE 5, c. 98.

[2] On January 25, 1916, Secretary Lansing sent a note expressing the disapprobation of the United States and reserving a protest, which was answered on February 16 by a brief explanation of the purposes and scope of the act. On July 26 the United States sent a formal protest, denying the legality of the measure and qualifying it as "inconsistent with that true justice, sincere amity, and impartial fairness which should characterize the dealings of friendly governments with one another." On October 12, Ambassador Page received a formal defense from Viscount Grey. This correspondence will be found in the White Book published by the State Department. This so far covers only up to April 16, 1916, but the British defense, the most important of the documents, will be found in the NEW YORK TIMES of November 15, 1916.

[3] See the allusion in paragraph eight of the British note in October, and also the remarks of Congressman Bennet of New York in 53 CONGRESSIONAL RECORD, No. 197, pp. 14299–304.

To be properly understood, this act must be considered as Great Britain's part in the Allies' coöperative economic policy relating to trade with the enemy, which received official recognition in the Recommendations of the Economic Conference of the Allied Governments.[4] Shortly after the outbreak of the war, both the French and the British governments issued proclamations forbidding trade with the enemy. Following the Anglo-American doctrine that domicile alone was the proper test, the Official Announcement in explanation of the Proclamation of August 5, 1914, provided that "for the purpose of deciding what transactions with foreign traders are permitted, the important thing is to consider where the foreign trader resides and carries on business, and not the nationality of the foreign trader."[5] Following the French doctrine that nationality is also a test, the French Decree of September 27, 1914, forbade "all trade with the subjects of the German and Austro-Hungarian Empire or the persons there resident."[6] It was to make the British prohibitions coextensive with those of her ally, and so to secure coöperation in law as well as in arms, that the Act of December 23, 1915, was passed. Thus a military alliance has brought about an adoption of foreign legal principles; for it is unlikely that Great Britain will revert to her narrower doctrine after the war. But it is plain that we can find no legal fault with a doctrine of so many years' undoubted standing.

There is equally no doubt as to the jurisdiction of Great Britain to

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[4] Published on June 17, 1916; accessible in the fourth supplement to 10 AM. J. OF INT. LAW, issued in October, 1916.

[5] Issued on August 22, 1914. See MANUAL OF EMERGENCY LEGISLATION, 377. The Proclamation on September 9, 1914 (MANUAL, p. 379) explained that "the expression 'enemy' . . . means any person . . . of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country." That this conforms with previous judicial opinion, see Porter *v.* Freudenberg, [1915] 1 K. B. 857, 868, and Janson *v.* Dreifontein Consolidated Mines, [1902] A. C. 484, 505. See also 2 OPPENHEIM, INTERNATIONAL LAW, § 88, citing GROTIUS, Bk. III, c. 4, §§ 6, 7, who in turn cites Livy and Thucydides. See also paragraph twelve of the British note of October, 1916.

[6] Accessible in 22 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, Documents, p. 28; A. SAILLARD, LE SÉQUESTRE, etc., p. 57, published by Berger-Levrault; ALEX. REULOS, MANUEL DES SÉQUESTRES, 1916, p. 11. Reulos explains on page 207: "This prohibition extends to every act of trade either with the nationals of these two countries, whatever their residence, by reason alone of their nationality, or with any person resident within the territory of these two Empires, whatever his nationality, by reason alone of his residence." See chapter six for a discussion of the decree. Originally it would seem that nationality was the sole test in France. In 1 DE PISTOYE ET DUVERDY, TRAITÉ DES PRISES MARITIMES, 321, is reported the case of Le Hardy *v.* La Voltigeante; on page 327, the court says: "Since the enemies of origin, although established in a neutral country and carrying on business under the protection of the neutral flag, do not lose their enemy character, it would be both unfair and illogical to make . . . neutrals of origin enemies solely because they reside and carry on business in any enemy country." Compare the following passage from the argument of counsel: "Look at the practice of the English, and follow their example. They do not seize only the ships and property belonging to . . . French subjects, but also the ships and the property of every person resident anywhere in French territory." In 4 CALVO, LE DROIT INTERNATIONAL, § 1932, the transition appears: ". . . commercial domicile does not create of itself a new nationality, but it creates a situation *sui generis*, . . . whence international law raises certain legal presumptions and practical effects which have sometimes the same result as a formal change of nationality"; see also § 1689

apply the act. The prohibition extends only to those persons "resident, carrying on business, or being in the United Kingdom,"[7] and a sovereign within his territory is necessarily supreme.[8] The French Decree, on the other hand, seems to go much farther than the British, and to apply to every French subject, at home or abroad.[9] But even this is quite in conformity with international law.[10] Recent examples make this clear. How can you distinguish between the right of a nation to call back its reserves from a foreign country at the outbreak of war, the right claimed by Austria to forbid her subjects abroad from working in munition plants that supply her enemies, and the right to forbid one's subjects abroad from trading with certain designated persons? Although Great Britain has denied herself in the Occident in this respect, the prohibition of the Trading with the Enemy Act of 1914 has been extended to all British subjects in the Orient within the jurisdiction of His Majesty's Supreme Court for China.[11] But this is only a use of Great Britain's exterritorial jurisdiction in China,[12] and so not analogous to the French Decree.

This leaves the Black List unexceptionable as a measure forbidding trade with enemy nationals wherever they may be; and thus far Great Britain has no more than kept pace with her ally, France. But what of the phrase, "by reason of their enemy association," hitherto unconsidered? These words can mean only that Englishmen may be prohibited from trading, not only with Germans, but with all persons who trade with Germans. Here is a long step beyond the French, and here lies the nub of the American protest. England imposes upon American merchants, among other neutrals, and also, it is fair to state, Allied merchants,[13] the alternative of trading with her enemies or with herself, but not with both. No matter what England claims to be doing in this matter, it is plain that American firms are to choose between trading with England or with Germany. This involves choice of customers by American firms located in America; therefore, the well-established international rule that a sovereign is supreme within his realm does not apply.

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[7] These words are repeated from the Trading with the Enemy Proclamation, August 5, 1914. See MANUAL OF EMERGENCY LEGISLATION, 375.

[8] BEALE, CONFLICT OF LAWS, § 107; Marshall, C. J., in Schooner Exchange *v.* M'Faddon, 7 Cranch (U. S.) 116, 136, "The jurisdiction of the nation within its own territories is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."

[9] This is not explicit, but it seems clear from the context and from the law of April 4, 1915. See REULOS, MANUEL DES SÉQUESTRES, 272. Reulos, on page 272, it may be added, entertains grave doubts whether this construction does not contravene Article five of the Code d'Instruction Criminelle, providing that a Frenchman can be convicted of a delict (which is this case) committed abroad only if it is also punishable by foreign law. But an act was proposed last January to cure this defect. And, in any event, Article five is not binding in the sense that our Constitution is; it could control only the construction of the decree.

[10] See 1 OPPENHEIM, INTERNATIONAL LAW, § 145, "The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." And BEALE, CONFLICT OF LAWS, § 106.

[11] MANUAL OF EMERGENCY LEGISLATION, Third Supplement, 297.

[12] See 53 & 54 VICT. c. 37 (1890). WHEATON, INTERNATIONAL LAW, 5 ed., 185, and 1 OPPENHEIM, *supra*, § 318.

[13] See paragraph seven of the British October note.

England's act partakes of the nature of a secondary boycott, and it becomes our problem to determine whether a belligerent power may justifiably attempt to conscript neutrals in the economic strangulation of her enemy.[14] In the absence of international rules it would seem permissible to look within the states to examine their regulations of the competitive struggle among individuals. Here it may be objected that municipal laws governing the orderly regulation of economic competition cannot be projected into the international sphere and applied as between warring states. But principles of international conduct have always been and must be sought in this way. As Kent has remarked: "We accordingly find that the rules of the civil law were applied to the government of national rights, and they have contributed very materially to the erection of the modern international law of Europe. From the thirteenth to the sixteenth centuries all controversies between nations were adjudged by the rules of the civil law."[15] That the use of the secondary boycott is illegal seems to be the municipal law of both England and America,[16] but there has been a striking difference of opinion on the subject,[17] and the method of approach to a determination of the question is more important for the matter now being discussed than the actual decisions.

It has been clearly recognized that in a conflict of interests it is necessary to strike a balance in order to attain a positive social gain. The purposes of the person or class employing the boycott are considered with reference to the welfare of the state, while the injury to be inflicted is also considered with reference to the social good. The sovereign state through its courts adjusts, according to its own ends, the conflicting internal elements. But as between nations there is no sovereign to adjust their conflicting interests to its own ends. Each nation is to judge for itself of the actions of the other with reference to it.

Just at this point it becomes obvious that the British Black List cannot be termed either legal or illegal. There is no world sovereign that can set itself up to consider the ends of the great war and to decide whether the condition of fighting shall be improved for one side or the other according to the aims of the World-State. There is no common sovereign to say that its welfare demands that the English cause be allowed to wield one additional weapon in its struggle for existence, maintenance of world domination, or whatever it is that England contends for. As pointed out above, neither do the municipal laws prohibiting secondary boycotts forge the international decision; they merely give us the method of looking at the problem.

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[14] It is assumed that the blacklisting has been done solely for belligerent purposes, since the contrary is unproved as well as without the scope of the act.

[15] 1 KENT, COMMENTARIES, 12 ed., 12.

[16] As far as judicial decisions go, it seems that in Great Britain, aside from the Trades Disputes Act of 1906 (6. EDW. 7, c. 47), the case of Quinn *v.* Leathem, [1901] A. C. 495, makes it fairly clear that a secondary boycott is illegal. In the United States only three of our States, New York, California, and Oklahoma, have squarely held it legal, whereas about twenty-five have held it illegal. See LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE, 236–37.

[17] See Mr. Justice Holmes' dissent in Vegelahn *v.* Guntner, 167 Mass. 92, 104, 44 N. E. 1077, 1079, and Plant *v.* Woods, 176 Mass. 492, 504, 57 N. E. 1011, 1015. Also 29 HARV. L. REV. 86.

In the absence of any world power adjusting the struggle between states in order to reach certain ends, or what are thought to be ends, it would seem that the United States can protest with good cause if the British Black List appears to have no reference to British aims in the struggle with Germany, or if it seems, in application, to involve action or produce effects not necessary to the satisfaction of those aims, for in either case England is acting arbitrarily. Two aspects of the English policy appear. First, if Viscount Grey is right, his government is seeking merely to cut off a stream of goods flowing from England, through America, to Germany.[18] Secondly, England's object may be the impressment of the United States into her policy of economic strangulation of Germany. In either aspect the Black List has a very apparent reference to England's purposes. Therefore it would seem that all this country can do about the Black List is to protest on some vague ground that its trade should not be killed.

The discussion, therefore, reduces to this: the English Black List will be acquiesced in or not according to whether or not this country regards England's aim as her aim.

ECCLESIASTICAL LAW: HOW FAR ADOPTED IN THE UNITED STATES. — An interesting question of statutory construction is involved in a recent decision that a court which by statute has power "to decree divorces from the bonds of matrimony" [1] has no jurisdiction by consequence to decree a legal separation. The legal separation, or divorce *a mensa et thoro*, was the decree given by the ecclesiastical courts of England. The court concedes that the ecclesiastical law is part of the common law,[2] but holds that it was not adopted in this country as part of the common law.[3] *Hodges* v. *Hodges*, 159 Pac. (N. M.) 1007.

The case does not present the same problem as is presented by the adoption of the principles of English law by our common law or equity courts.[4] In these cases tribunals were set up which were essentially the counterparts of their prototypes in England,[5] and hence if not by explicit provision, at least by implication,[6] they were given the entire jurisdiction of the English common law courts or courts of equity.[7] Because, however, of the difference in thought and in institutions due largely to the absence of an established church in most of the colonies, no ecclesiastical

[18] British Note of October last, paragraph six. "The legislation merely prohibits persons in the United Kingdom from trading with specified individuals, who by reason of their nationality or their associations are found to support the cause of the enemy, and trading with whom will therefore strengthen that cause."

[1] N. M. STAT. 1915, § 2773.

[2] See Crump *v.* Morgan, 3 Ired. Eq. (N. C.) 91, 98; Le Barron *v.* Le Barron, 35 Vt. 365, 367; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 116 *ff.*; 1 COOLEY'S BLACKSTONE, COMMENTARIES, 4 ed., * 84; DEAN POUND, INTRODUCTION TO THE STUDY OF LAW, 30–31.

[3] The New Mexico courts are directed by statute to apply "the common law as recognized in the United States of America." N. M. STAT. 1915, § 1354.

[4] For the legal theory as commonly stated, see 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., § 157. *Cf.* REINSCH, THE ENGLISH COMMON LAW IN THE EARLY COLONIES, BULLETIN OF THE UNIVERSITY OF WISCONSIN, Historical Series II, No. 4.

[5] See Commonwealth *v.* Knowlton, 2 Mass. 530, 534–35.

[6] See Cleveland, etc. R. Co. *v.* Keary, 3 Ohio St. 201, 205.

[7] See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 56–58.